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No. 660.

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Supreme Court of the United States

October Term, 1961.

TEXACO PUERTO RICO INC.,

Petitioner,

vs.

JUSTINO V. ARMAIZ and his wife JOAQUINA GONZALEZ, and MOBIL OIL CARIBE, INC.,

Respondents.

PETITIONER'S REPLY BRIEF.

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I.

The decision of the lower court was based solely upon the erroneous conclusion that the affirmative defenses were proper under federal law.

In their efforts to forestall a decision on the merits by this Court, respondents place their major reliance on the contention—made in the teeth of the record and of respondents' prior contentions to the contrary—that the decision below involved nothing more than a question of local Puerto Rican law, substantive or procedural.

Respondents sprinkle their brief with unqualified statements that the complaint was dismissed for a failure "to answer interrogatories relevant to a question of illegality *under local Puerto Rican law*". (Respondents' Brief, p. 2), that "the trial court's decision [was] that such defenses were proper *under the local Puerto Rican antitrust stat-*

utes" (*id.* at 6), that the defenses were held by the Superior Court "to be sufficient *as a matter of Puerto Rican substantive law under the local antitrust statutes.*" *Id.* at 8. (emphasis supplied)

The frequency and certainty with which these assertions are made should not be permitted to obscure the fact that they are wholly erroneous.

No question of local law was adjudicated by the Superior Court. It is unarguable, as pointed out by both petitioner and respondents, that respondents' answer in this litigation raised *defenses* under both federal law and the local Puerto Rican law.[1] It is equally unarguable, however, that only federal cases were urged upon the court by the respondents and that the Superior Court, in reaching its *decision*, examined only federal precedents and neither considered nor adjudicated questions of local law. This important distinction should not be permitted to be obscured by respondents' constant shifting back and forth between discussion of the "defenses" and discussion of the "decision".

It is too late in the day for respondents now to decide that they would have been better advised to urge the lower court to sustain the defenses on the basis of local, rather than federal, law. What cannot now be gainsaid is that the issue was briefed and argued by both sides to the lower court entirely on the basis of the federal judicial authorities; the court in its decision cited only such authorities.[2]

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[1] *See, e.g.*, Respondents' Brief, p. 8; Defendants' Opposition to the Petition for Review, October 5, 1961 (62-63).

[2] Two further explanations exist for the court's reliance on the federal, rather than the local, aspects of the defenses. A major basis of respondents' attack was Section 3 of the Clayton Act [erroneously cited in Respondents' Brief as Section 7, see Respondents' Brief, p. 16], which has no local law counterpart; in addition, the local law had never before been construed to permit the interposition of antitrust defenses in contract actions. *See* Respondents' Brief, p. 10.

Since the affirmative defenses were sustainable upon a finding of propriety under either federal or local antitrust laws, once a determination of propriety had been made under one, it was unnecessary for the court to enter upon an examination of the other. Nor did the court do so. At no time did it make any independent determination whatever under local law, writing it off in its single reference as merely the "equivalent" of the federal law. This is not a question open to dispute; it can readily be resolved by consulting the opinion of the lower court itself, printed as Appendix A to the Petition.

Respondent's only response is that "There is no reason why these local [antitrust] statutes must be equated to the federal antitrust laws". Respondents' Brief, p. 10. Respondents are wrong on two counts. First, whether or not there is such a reason, the plain fact is that the court did in fact so equate the local law. Second, the reason for such equation does exist: in Puerto Rico, the federal antitrust laws apply internally to *intrastate* commerce. See 48 U. S. C. 734 (continued by Compact, 48 U. S. C. 731e.). A Puerto Rico court is therefore more restricted than is a state court in the extent to which it can construe the local law differently from federal law. Where federal law does not permit antitrust defenses because they would clog the commerce subject to the federal laws, it is hardly likely that a local Puerto Rican court could authorize such a clog upon the same commerce.

One further argument advanced by respondents cannot be passed over without comment. Respondents make much of a purported concession by petitioner before the Puerto Rico Supreme Court that the affirmative defenses raised only issues under "the antitrust laws of the Commonwealth of Puerto Rico." Respondents' Brief, p. 6. Respondents state with some asperity, that:

> "Strangely, when petitioner was trying to induce the Supreme Court of Puerto Rico to grant a discretionary review, petitioner specifically urged the importance of the question presented under the local Puerto Rican antitrust statutes. One must assume plaintiff realized that to obtain a reversal of the decision of the trial court, it had to convince the Supreme Court that the decision was an erroneous interpretation of Puerto Rican statutes" *Id.* at 7.

If respondents had made the most casual check, they would have recognized that this purported concession was in actuality no more than a translator's error, that petitioner's papers used precisely the words of respondents' affirmative defenses ("las leyes contra monopolios vigentes en el Estado Libro Asociado de Puerto Rico"), which were properly translated in the affirmative defenses as the antitrust laws "in force" in Puerto Rico (29)—a locution which respondents themselves concede refers to the federal antitrust laws as well.

The foregoing reasons render it totally unreasonable to believe that the lower court was basing its decision upon a new and independent interpretation of the local antitrust statute rather than upon its reading of federal law. That an election was available to the court to base its decision on local law instead is immaterial. The short answer is that it did not. As this Court stated in *St Louis, Iron Mountain & Southern Ry.* v. *McWhirter*, 229 U. S. 265, 276 (1913):

> "Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out . . . that to admit that the authority to review the

> action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion 'that the court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion."

Indeed, even if the affirmative defenses had been based entirely upon the local antitrust laws (as is concededly not the case), by viewing such laws as "equivalent" to federal law, by grounding its decision solely upon its reading of the decisions of this Court and by failing to "declare its independence of the decisions of this Court," the decision would still present a federal question. See *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 556 (1940); *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481 (1942); *State Tax Commission of Utah* v. *Van Cott*, 306 U. S. 511 (1939).

II.

The right to review a court order wrongly adjudicating a federal question is preserved—not lost—by refusing to comply with such order.

Respondents further attempt to muddy the waters by asserting that, even if the lower court's initial order—which refused to strike the antitrust defenses and directed petitioner to answer interrogatories predicated on such supposed defenses—wrongly adjudicated federal law, petitioner's right to review that order has somehow been lost by petitioner's failure to comply with it and by the consequent final judgment dismissing petitioner's complaint by reason of such failure. Respondents' apparent premise is that, where a local procedural rule provides for dis-

missal of a complaint for failure to comply with an order, a litigant has no alternative but to comply, regardless of how erroneous the order may be under federal law.

This contention is wholly untenable. Refusal to comply with an improper order is the traditional method for securing its review. See, *e.g.*, *Hickman* v. *Taylor*, 329 U. S. 495 (1947); *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958). And necessarily so. If a litigant could preserve his right of review in this Court only by complying with an erroneous state order, a lower state court would be able to command absolute compliance with the most outrageous interlocutory orders. A litigant would be thrust into the grotesque position where the only way he could preserve his right of review would be by suffering the very injury which he sought review in order to avoid.

The absurdity of such a contention could not be more graphically demonstrated than it is by the facts of this case. Under respondents' theory, the improper interposition of a federal antitrust defense would necessarily mean—if a lower court erroneously refused to strike it at the very outset—that the litigant would be dragged endlessly through the labyrinth of antitrust discovery, powerless to test the propriety of the order even by nonsuit. The litigant's plight would be even further aggravated where compliance required the litigant to turn over to an aggressive competitor the most sensitive competitive information. Far more is involved than—as respondents would have this Court believe—the dry legal question of a court's deferring the time for passing upon affirmative defenses.[3] At stake is

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[3] "In effect, the court merely concluded that the efficacy of such affirmative defenses should be left for determination at the trial. Certainly such a decision involves no controlling problem of federal law." Respondents' Brief, p. 10.

the right of a litigant to some effective avenue of review to correct an erroneous and oppressive order.

Equally a victim of respondents' theory would be the very federal policy which led to the rule of this Court against antitrust defenses in contract actions. This policy is squarely based upon the recognition that contractual obligations are effectively nullified if ordinary contract actions are permitted to be converted by astute defendants into mammoth antitrust marathons. This consideration is of particular force in the case of actions in the state courts, where contract actions usually arise, and which are less likely to reach resolutions consistent with federal policy, as this very case demonstrates.

This Court's limitation of the defense to "intrinsically illegal" contracts is patently designed to avoid precisely this result. It is of the essence of this Court's policy that such defenses be stricken *in limine*, and the cases have characteristically arisen, as has this one, on motions to strike the antitrust defense prior to the commencement of discovery appurtenant to it.[4]

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[4] See, *e.g.*, *Kelly* v. *Kosuga*, 358 U. S. 516 (1959); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947); *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248 (1925); *D. E. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915). In each of the foregoing cases, the Court affirmed the granting of motions to strike antitrust defenses or the sustaining of demurrers to such defenses. *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), where the defense was sustained, reached the Court after a demurrer to the defense had been overruled and the plaintiff, rather than proceeding further, allowed judgment to be entered dismissing its action to enable it to test the propriety of the defense.

III.

This Court is not barred from review of erroneous federal-question decisions of the lower Puerto Rican courts.

In its petition, petitioner noted that an overliteral construction of Section 1258 would deprive not merely this Court, but the entire federal court system, of any corrective power over erroneous adjudications of federal questions by inferior Puerto Rican courts, wherever the Puerto Rico Supreme Court had failed to review. The inferior Puerto Rican courts, petitioner noted, would thus become the final arbiter of the most intricate questions of federal policy—a distinction which they alone would possess among all state and federal courts.

Respondents in their brief, argue for precisely this absurd result. Respondents' position, pure and simple, is that wherever review of a decision of a lower Puerto Rican court is refused by the Puerto Rican Supreme Court, such decision is forever placed beyond the review power of this Court, however erroneous that decision might be and however important the federal policy which the lower court overrode.

Respondents reach this result in two short steps. First, under Section 1258, according to respondents, certiorari "lies *only* from final judgments or decrees of the Supreme Court of the Commonwealth" (Respondents' Brief, p. 11) (emphasis in original); any possibility of direct review by this Court of decisions of the lower Puerto Rican courts is thus eliminated.

Second, respondents regard review of the Puerto Rico Supreme Court's action as equally forbidden. The Puerto Rico court's refusal to review is, in respondents' eyes, a

nonreviewable question of discretion; even if it were reviewable on this ground, it would still be nonreviewable wherever it "*might* have rested on nonfederal grounds." Respondents' Brief, p. 15 (emphasis supplied). Since refusal to review can always be ascribed to a wide variety of unstated grounds, including such things as calendar congestion, respondents' analysis effectively eliminates as well this last avenue of review by this Court.[5]

The chief significance of respondents' brief lies in what it does not say: It cannot change the demonstrated fact that Congress' intent was precisely contrary to the position here taken by respondents,[6] that Congress, far from seeking to oust this Court of jurisdiction comparable to that which it has always enjoyed over federal question decisions of the several states, explicitly sought instead to confer such jurisdiction upon it and to place Puerto Rico on an equal footing with the States. See Petition, pp. 10-15.

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[5] Contrary to respondents' assertion, petitioner nowhere contended that constitutional questions decided by the lower Puerto Rican courts were nonreviewable. See Respondents' Brief, pp. 15-16. Respondents, however, can derive little comfort from the fact that, under existing Puerto Rico statutes, constitutional questions are appealable as of right to the Puerto Rico Supreme Court. Constitutional questions are, of course, far from the only questions of major significance to the rights of individuals and to national policies. And under respondents' reading of Section 1258, this provision could be repealed by the Puerto Rico Legislature tomorrow and thereby oust this Court of jurisdiction to review even such questions.

[6] About the only comment made by respondents with respect to Congressional intent is their statement at p. 12, n. 13, that "Congress has specifically provided for direct review by this Court of those rulings of the lower courts of Puerto Rico which it felt should be so reviewed." The section referred to, Section 1254, was not, of course, directed particularly to Puerto Rico, but applies equally to all United States courts and permits direct review of all decisions invalidating acts of Congress in actions in which the United States is a party. Respondents' reference to this "special section in the Judicial Code" as though it were an example of special Congressional provision for review of decisions of lower Puerto Rican courts is quite misleading.

It is respectfully submitted that it would be a travesty to deprive this Court of jurisdiction in the guise of obedience to a legislative mandate, where the mandate is, unarguably, precisely to the contrary.

IV.

Respondents' avoidance of the merits.

With understandable restraint, respondents say scarcely a word in defense of the substance of the decision of the Puerto Rico Superior Court, burying in a single paragraph at the very end of their brief their entire discussion of the major issue herein: the lower court's flagrant disregard of this Court's policy against interposition of antitrust defenses in contract actions.

Respondents' only comment is to express their personal confidence that a District Court of the United States would reach the same result, since this was an injunction action, rather than a case of "unjust enrichment"—a confidence which would seem singularly misplaced in view of the fact that the Seventh Circuit, in recently passing upon this purported distinction, reached a result precisely contrary to that urged in respondents' brief: *Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959). See also *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248 (1925) (sustaining a demurrer to an antitrust defense although defendant had not been unjustly enriched.)

One final conclusion may be in order: if counsel can, with apparent seriousness, assert that this Court's long-enunciated policy is limited *solely* to cases of unjust enrichment and can express the opinion that a District Court would so hold, then this fact would seem to furnish strong additional evidence that this Court should grant certiorari to settle, one way or another, for the benefit of the bar and the lower

federal and state courts, whether such distinction in fact exists.

Conclusion.

Respondents' tactics in their brief in opposition seem clear: to evade the substantive issue tendered to this Court and, instead, to try to raise a sufficient fog of doubt as to the existence of an issue of local law to cause certiorari to be denied.

It is respectfully submitted that these efforts of respondents cannot be permitted to becloud the basic and nationally significant issue tendered by this case to this Court. The decision below was squarely based upon a federal question, not an independent local ground; this Court has jurisdiction to review it; the questions presented are of such importance that review is called for.

For the foregoing reasons, the petition for writs of certiorari should be granted.

Respectfully submitted,

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